

<b>MARK FAUL,</b>	)	<b>AGBCA No. 2004-141-1</b>
	)	
Appellant	)	
	)	
<b>Representing the Appellant:</b>	)	
	)	
Mark Faul, <u>pro se</u>	)	
282 Dogwood View Lane	)	
Suwanee, Georgia 30024	)	
	)	
<b>Representing the Government:</b>	)	
	)	
Mark R. Simpson, Esquire	)	
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**RULING ON SUMMARY JUDGMENT**

July 29, 2004

**Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge WESTBROOK.**

This appeal arises out of a U. S. Forest Service auction sale of replaced vehicles held November 8, 2003, at the Chicopee Woods Agri-Center, Gainesville, Georgia. Mark Faul, of Suwanee, Georgia (Appellant or Mr. Faul) purchased a 1996 Jeep Cherokee at the sale. The U. S. Forest Service (FS or the Government) is an agency of the U. S. Department of Agriculture. The appeal, received at the Board February 24, 2004, was from the Contracting Officer's (CO) decision dated December 4, 2003, denying Appellant's claim for nullification of the sale. The FS has filed a Motion for Summary Judgment. Appellant opposes the Government's motion and requests a hearing. Based on the reasoning set out below, the Government's motion is denied.

The Board has jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended.

### FINDINGS OF FACT

1. On November 8, 2003, the FS held an auction of replaced vehicles at the Chicopee Woods Agri-Center, Gainesville, Georgia. The auction had been advertised in advance by means of a solicitation, "USFS Auction Sale of Replaced Vehicles." The solicitation did not carry an identifying number. The solicitation provided that vehicles were available for inspection on November 6 and 7. Under the section headed General Provisions, the solicitation advised prospective bidders that the condition of property is not guaranteed. Bidders were cautioned to inspect and assure themselves of the condition before bidding. The solicitation also specified that after payment was made, title passes to the purchaser and sole responsibility for the property shall be that of the purchaser. Additionally, the section provided that the sale was subject to the provisions of Standard Form (SF) 114C, Sale of Government Property, General Sale Terms and Conditions, and SF 114C, Special Auctions Conditions. (Appeal File (AF) 3.)

2. The section of the solicitation, Description Warranty, states that the Government warrants to the original purchaser that the property listed in the Invitation for Bids will conform to its description. If a misdescription is determined after the property is removed, the Government will refund any money paid if the purchaser takes the property at his or her expense to a location specified by the CO. No refund will be made unless the purchaser submits a written notice to the CO within 15 calendar days of the date of removal that the property is misdescribed and maintains the property in the same condition as when removed. (AF 4.)

3. The Deficiencies paragraph of the solicitation, immediately preceding the list of replaced vehicles to be sold, provides: "Deficiencies, when known, have been indicated in the item description. However, absence of any indicated deficiencies does not mean the item is without deficiencies." The list of advertised vehicles showed two types of deficiencies. Several were shown as wrecked or totaled and one was shown as "motor seized." (AF 5.)

4. The vehicle purchased by Appellant was described as follows: "94. 1996 Jeep Cherokee, 4X4, FSID# 201-5241, S/N IJ4FJ28S2TL208032, 6CYL, 5SPD Manual A/C, P/S, P/B, Cruise Control" (AF 7).

5. SF 114C, Sale of Government Property, General Sale Terms and Conditions, clause 2, "Condition and Location of Property" reads as follows:

Unless otherwise provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." Unless otherwise provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or to its fitness for any use or purpose. Except as provided in Conditions No. 12 and 14 or other special conditions of the Invitation, no request for adjustment in price or rescission of the sale will be considered. *This is not a sale by sample.* (Emphasis in original.)

(AF 9.)

6. Condition No. 12, "Adjustment for Variation in Quantity or Weight," is not relevant to this sale of a single vehicle. Condition No. 14, "Risk of Loss," provides:

Unless otherwise provided in the Invitation, the Government will be responsible for the care and protection of the property subsequent to it being available for inspection and prior to its removal. Any loss, damage, or destruction occurring during such period will be adjusted by the Contracting Officer to the extent it was not caused directly or indirectly by the Purchaser, its agents, or employees. At the discretion of the Contracting Officer, the adjustment may consist of recission. With respect to losses only, in the event the property is offered for sale by the "lot," no adjustment will be authorized under this provision unless the Government is notified of the loss prior to removal from the installation of any portion of the lot with respect to which the loss is claimed.

(AF 10.)

7. Condition No. 16, "Oral Statements and Modifications," reads as follows:

Any oral statements or representation by any representative of the Government, changing or supplementing the Invitation or contract or any Condition thereof, is unauthorized and shall confer no right upon the Bidder or Purchaser. Further, no interpretation of any provision of the contract, including applicable performance requirements, shall be binding on the Government unless furnished, or agreed to, in writing, by the Contracting Officer or his designated representative.

(AF 10.)

8. Appellant registered at the sale and was assigned Bidder Registration No. 0402. As such he bid \$6,500 for item No. 94. (AF 12.) He was provided a certificate to obtain title to the vehicle (1996 Jeep Cherokee XJL74) signed by CO, Marcia OConnor. The certificate was dated November 8, 2003. (AF 14.)

9. In a letter dated November 10, 2003, Appellant wrote the FS to the attention of Christy Smith. He stated that on the day of the sale, a uniformed FS employee told him that the Jeep Cherokee had been used mainly by the Safety Engineer, had been maintained every 3,000 miles and babied by the main driver. He quoted the employee as telling him "you are getting a very nice car." Appellant's letter went on to say that the car lost power on the trip from the auction site to his home. He was able to restart it and get it home. During this trip he smelled gasoline fumes. This odor continued after the car was garaged at his home. Appellant concluded that the car had low mileage because it was in need of repairs and therefore not driven. He also concluded that the car was misidentified and should have been labeled a wreck or a mechanical wreck. He expressed his wish to nullify the sale because of verbal misrepresentations by the FS and because the vehicle was

identified as a non-wreck. (AF 15-17.) The record contains no indication that the FS made a written response to the November 10, 2003 letter.

10. Appellant's second letter, which was dated November 17, 2003, indicates that he and CO Christy Smith had a telephone conversation on November 13, 2003. According to Appellant, at that time the CO said she did not have enough information to warrant a refund. Appellant reports that he said he would gather additional evidence. To that end, Appellant provided two written estimates for transmission repairs; a statement that a Carfax search for record of emissions reports came up negative; and statements that the certificate to obtain title contained omissions of information. He concluded that the FS knew or should have known that the car had major transmission problems; that the car was never serviced for major emissions problems and that failure to certify the odometer reading and the correct model of the car is a clear misdescription. His conclusion from this information was that the FS knew the car had major mechanical problems which were not disclosed. (AF 18-25.)

11. Internal FS e-mail messages dated from November 10-13, 2003, consistently aver that FS employees were unaware of any mechanical problems with the Jeep Cherokee in question. An e-mail from the Fleet Manager, Savannah River Forest, explains the low mileage as being due to the fact that it located was in one of the smallest forests in the FS region. The fleet manager herself had driven the vehicle to the automotive service center for a routine pre-sale check without becoming aware of any mechanical difficulties. (AF 26-29.)

12. The CO issued a final decision on the claim December 4, 2003. She cited the statement from the General Provisions that the condition of property is not guaranteed; the SF 114C provision that property is listed for sale "as is"; and the fact that the only ground for rescission is determination of misdescription. She considered Appellant's remaining arguments (possible FS knowledge of mechanical problems; low mileage; limited inspection; possible vandalism; and oral statements by a FS employee) determining that none were grounds for nullifying the sale. (AF 30-31.)

13. Appellant filed a timely appeal to the Board. The FS has filed a Motion for Summary Judgment.

### **DISCUSSION**

Summary judgment is appropriate in cases where construing the facts in favor of the non-moving party, there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Construed in favor of Appellant, the non-moving party, the facts are the following. The description of the vehicle was silent regarding whether the vehicle had been in a wreck or whether it had a transmission problem. The description omitted the model identification of "SE" (Finding of Fact (FF) 4). A Government employee stated to Appellant that he was getting a very good vehicle and that it had been used by the Safety Engineer and had been maintained. (FF 9). Appellant purchased the

vehicle which proved to be in such a condition when sold that it lost power on the trip from the site of the sale. Appellant was able to restart it and drive it home, but it emitted gasoline fumes on the drive to Appellant's home and when parked in his garage. Its condition led Appellant and two repair shops to conclude that it was in need of transmission work. (FF 9, 10.) Appellant also posits that the Government knew that the transmission was faulty and did not disclose that fact. This is the ultimate question of fact to be resolved.

The contract clearly advised prospective purchasers that vehicles were being sold "as is" and that the Government made no warranty as to quality or fitness for use for any purpose. The solicitation clearly places on purchasers the risk of the condition of the vehicle being auctioned (FF 1). Establishing misdescription is the only potential basis for recovery (FF 2).

Under the Deficiencies clause, which the Government does not address in its motion, the Government lists the vehicles for sale and advises that deficiencies when known have been indicated in the item description. Absence of indicated deficiencies does not mean that the item is without deficiencies. A review of the list of advertised vehicles shows only two types of indicated deficiencies. A number are identified as having been wrecked or totaled and a single vehicle, number 25, is indicated as "motor seized." (FF 2.)

To establish entitlement to a refund, Appellant will have to show that a deficiency existed and, the FS knew of a deficiency and failed to list it. For the present purpose of ruling on a motion for summary judgment, all the Appellant must show is that, drawing all reasonable inferences in the favor of the non-moving party, a trier of fact could find that the FS knew of the transmission problems at the time of the sale. There is presently no direct evidence of FS knowledge of a deficiency. Thus, although information in the existing record suggests that the Government was unaware of any transmission deficiency, Appellant has not had the opportunity to probe affiants or witnesses. At this stage of the appeal, in resolving the present motion, a trier of fact could infer from the construed fact that the problems surfaced immediately after the sale that the deficiencies existed when the vehicle was brought to the auction site and the FS was aware of them. This inference is sufficient to defeat the Government's motion for summary judgment. The Board will, therefore, schedule further proceedings. Appellant is advised, however, that he has the burden of proof and a mere inference of Government knowledge is not sufficient to counter credible evidence to the contrary.

**RULING**

The Government's Motion for Summary Judgment is denied.

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**ANNE W. WESTBROOK**  
Administrative Judge

**Concurring:**

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**HOWARD A. POLLACK**  
Administrative Judge

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**JOSEPH A. VERGILIO**  
Administrative Judge

**Issued at Washington, D.C.**  
**July 29, 2004**